

No. 45077-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Troy Akin,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01413-0

The Honorable Judge Marilyn Haan

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1
I. The court prohibited Mr. Akin from participating in his defense in violation of his rights under the Sixth and Fourteenth Amendments and Art. I, § 22.....	1
II. The court violated Mr. Akin’s right to confront adverse witnesses when it admitted a video containing testimonial statements by his attorney.....	1
III. Mr. Akin was denied the effective assistance of counsel because his attorney had an actual conflict of interest..	4
IV. Mr. Akin’s was denied due process because the instructing defining bail jumping contradicted the to-convict instruction.....	6
CONCLUSION	7

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	1, 3
--	------

WASHINGTON STATE CASES

<i>Dever v. Fowler</i> , 63 Wn. App. 35, 816 P.2d 1237 (1991) <i>amended</i> , 824 P.2d 1237 (1992).....	6
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	1, 4
<i>Koker v. Armstrong Cork, Inc.</i> , 60 Wn. App. 466, 804 P.2d 659 (1991).....	6, 7
<i>State v. Haq</i> , 166 Wn. App. 221, 268 P.3d 997 (2012)	2
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012)	1, 3
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	2
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012)	7
<i>State v. Regan</i> , 143 Wn. App. 419, 177 P.3d 783 (2008).....	4, 5, 6
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	2, 3
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012)	7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	1
U.S. Const. Amend. XIV	1
Wash. Const. art. I, § 22.....	1

OTHER AUTHORITIES

RAP 2.5..... 2, 6, 7

ARGUMENT

I. THE COURT PROHIBITED MR. AKIN FROM PARTICIPATING IN HIS DEFENSE IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ART. I, § 22.

Mr. Akin relies on the argument in his Opening Brief.

II. THE COURT VIOLATED MR. AKIN’S RIGHT TO CONFRONT ADVERSE WITNESSES WHEN IT ADMITTED A VIDEO CONTAINING TESTIMONIAL STATEMENTS BY HIS ATTORNEY.

The confrontation clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the accused has had a prior opportunity for cross-examination. *State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)); U.S. Const. Amend. VI, XIV; art. I, § 22. At Mr. Akin’s trial, the state played a video containing testimonial statements of defense counsel, whom Mr. Akin never had the opportunity to cross-examine. Ex 2; RP 36.

Respondent does not contest that counsel’s statements were testimonial. *See* Brief of Respondent; *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009) (The absence of argument on a point can be treated as a concession).

Instead, the state argues that the confrontation error does not constitute manifest error affecting a constitutional right under RAP

2.5(a)(3). Brief of Respondent, pp. 8-9. The state contends that the error is not manifest because counsel's statement on the video did not constitute an "explicit or nearly explicit opinion" of Mr. Akin's guilt. Brief of Respondent, p. 8 (*citing State v. Kirkman*, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007); *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012)).

But the authority the state relies on is not relevant to Mr. Akin's case. Both *Kirkman* and *Haq* deal with claims that a witness made an improper comment on guilt or credibility. *Kirkman*, 159 Wn.2d at 934-35; *Haq*, 166 Wn. App. at 266-67. Neither case addresses a confrontation error. *Id.*

The RAP 2.5(a)(3) standard is met when the error had "practical and identifiable" consequences in a case. *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

Here, Mr. Akin's counsel was the only witness who testified to his personal recollection of the alleged failure to appear. RP 26-39. Without his testimonial statements, the state's case would have relied exclusively on the testimony of a clerk who was only in the courtroom for two of the relevant hearings. RP 29. The clerk did not claim to have any independent recollection of the hearings and testified based on the minute sheets alone. RP 26-39.

The admission of defense counsel's testimonial statement in violation of Mr. Akin's right to confront adverse witnesses had "practical and identifiable" consequences at trial. *Schaler*, 169 Wn.2d at 284.

Finally, violation of the right to confront adverse witnesses requires reversal unless the state can show that the error was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117. Nonetheless, the state claims that Mr. Akin was not prejudiced by the admission of his attorney's statements because the prosecution relied solely on the clerk's testimony to convict Mr. Akin. Brief of Respondent, p. 9-10. The state does not explain why, then, the prosecution offered the video of Mr. Akin's attorney and played it for the jury. *See* Brief of Respondent. As outlined above, the state's case would be quite thin absent the video of defense counsel. The state cannot show that the erroneous admission of defense counsel's testimonial statement was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117.

The court violated Mr. Akin's right to confront adverse witnesses by admitting a testimonial statement by his defense attorney. *Crawford*, 541 U.S. at 51. Mr. Akin's conviction must be reversed. *Id.* at 69.

III. MR. AKIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY HAD AN ACTUAL CONFLICT OF INTEREST.

The right to counsel includes the right to an attorney free from conflicts of interest. *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008). If an actual conflict of interest exists, representation is ineffective even absent a showing of prejudice. *Id.* at 427. Here, a video of a statement by defense counsel was used as evidence against Mr. Akin. RP 36.

Respondent does not argue that defense counsel did not have a conflict of interest in Mr. Akin's case. Brief of Respondent, pp. 11-14.¹ Instead, the state claims that the conflict does not require reversal because there was no plausible alternative defense strategy or tactic that defense counsel failed to pursue because of his other loyalties or interests. Brief of Respondent, p. 13.

As Mr. Akin points out in his Opening Brief, there were at least two ways in which defense counsel's conflict of interest affected his representation. First, counsel did not assert Mr. Akin's right to confront adverse witnesses when the state introduced counsel's statement at a preliminary hearing as evidence against his client. The state does not

¹ Respondent's lack of argument on this point may be taken as a concession. *Pullman*, 167 Wn.2d at 212.

contest that counsel's statement as testimonial or that Mr. Akin did not have the opportunity to cross-examine him. Brief of Respondent, pp. 6-10. Absent the conflict, defense counsel could have objected to the admission of the video or insisted that he be given the opportunity to cross-examine the witness (himself).

Second, if defense counsel had not himself been the witness, he could have challenged whether the witness had thoroughly searched for Mr. Akin in all areas of the courthouse. He could have asked whether the witness had attempted to call Mr. Akin to ask about traffic and other delays.

Respondent claims that, because the theory defense counsel pursued at trial was contradictory to the ones he forewent, Mr. Akin cannot show that there was a plausible defense tactic that counsel did not pursue because of the conflict. Brief of Respondent, pp. 13-14. It defies logic to base the analysis of whether an attorney failed to pursue a defense strategy because of a conflict based on the strategy s/he actually pursued when s/he had the conflict. Mr. Akin has identified at least two tactics that his attorney did not pursue because of his conflict of interest. The conflict requires reversal even without a separate showing of prejudice. *Regan*, 143 Wn. App. at 427.

The actual conflict of interest between Mr. Akin his attorney violated Mr. Akin's right to counsel. *Regan*, 143 Wn. App. at 430. The conflict prevented defense counsel from pursuing a plausible strategy. *Id.* at 428. Mr. Akin's conviction must be reversed. *Id.*

IV. MR. AKIN'S WAS DENIED DUE PROCESS BECAUSE THE INSTRUCTING DEFINING BAIL JUMPING CONTRADICTED THE TO-CONVICT INSTRUCTION.

Instructions providing "inconsistent decisional standards" require reversal. *Dever v. Fowler*, 63 Wn. App. 35, 41, 816 P.2d 1237 (1991) *amended*, 824 P.2d 1237 (1992). If the inconsistency relates to a material point, prejudice is presumed because "it is impossible to know what effect [such an error] may have on the verdict." *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 483, 804 P.2d 659 (1991). The court's definitional and to-convict instructions for bail jumping in Mr. Akin's case contradicted one another. CP 39, 41.

Respondent argues that Mr. Akin cannot raise this issue for the first time on review because he cannot show actual prejudice under RAP 2.5(a)(3). Brief of Respondent, pp. 14-15. The state is correct in that it is impossible to speculate as to which instruction the jury relied upon when it convicted Mr. Akin. For this reason, the error must be presumed prejudicial. *Koker*, 60 Wn. App. at 483.

When the nature of an issue makes it impossible to show prejudice, a court may, nonetheless, consider the issue for the first time on appeal under RAP 2.5(a)(3). *State v. Wise*, 176 Wn.2d 1, 18 n. 11, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 37, 288 P.3d 1126 (2012) (“Requiring a showing of prejudice would effectively create a wrong without a remedy”).

The nature of the error Mr. Akin claims precludes a showing of prejudice. *Koker*, 60 Wn. App. at 483. Nonetheless, the court should review the issue in order to avoid recognizing a “wrong without a remedy.” *Paumier*, 176 Wn.2d at 37.

The court’s instructions to Mr. Akin’s jury contradicted one another. *Koker*, 60 Wn. App. at 483. His conviction must be reversed. *Id.* at 485.

CONCLUSION

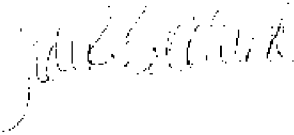
The trial court prohibited Mr. Akin from participating in his defense in violation of his rights to confront adverse witnesses, to due process, to be present, and to appear and defend in person. The admission of video-recorded testimonial statements by defense counsel violated Mr. Akin’s right to confront adverse witnesses. Trial counsel had an actual conflict of interest, which violated Mr. Akin’s right to counsel. The

court's instructions provided inconsistent decisional standards for the jury.


Mr. Akin's conviction must be reversed.

Respectfully submitted on January 16, 2014,

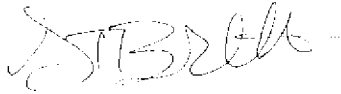
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Troy Akin
127 Ragland Road
Longview, WA 98632

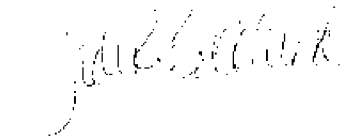
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
bours@co.cowlitz.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 16, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

January 16, 2014 - 4:46 PM

Transmittal Letter

Document Uploaded: 450771-Reply Brief.pdf

Case Name: State v. Troy Akin

Court of Appeals Case Number: 45077-1

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

☒ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**

A copy of this document has been emailed to the following addresses:
baurs@co.cowlitz.wa.us